

STATE OF MICHIGAN  
IN THE SUPREME COURT  
ON APPEAL FROM THE COURT OF APPEALS  
(Neff, P.J., and Wilder and Cooper, J.J.)

CENTRAL CEILING & PARTITION, INC.,  
Plaintiff-Appellee

Supreme Court No.121009

Court of Appeals No.: 225378

vs.

Wayne County Circuit Court  
No.: 98-810597 CH

STATE OF MICHIGAN DEPARTMENT  
OF COMMERCE HOMEOWNER  
CONSTRUCTION LIEN RECOVERY FUND,

Defendant-Appellant,

And

KITCHEN SUPPLIERS, INC.,

Defendant, Cross and Counter  
Plaintiff - Appellee,

And

CAPPY HEATING AND AIR CONDITIONING, INC.,

Intervenor, Cross-Claimant, Counter-  
Claimant and Third Party Plaintiff –  
Appellee

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**BRIEF ON APPEAL OF APPELLEE**  
**CAPPY HEATING & AIR CONDITIONING, INC**  
**ORAL ARGUMENT REQUESTED**

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**QUESTION PRESENTED FOR REVIEW**

WHERE A LIEN CLAIMANT UNDER THE MICHIGAN CONSTRUCTION LIEN ACT (*MCLA §570.1101, ET SEQ.*) DOES ALL IT CAN DO WITH RESPECT TO RECORDING ITS CLAIM OF LIEN WITHIN THE STATUTORILY MANDATED 90 DAYS FROM THE LAST PERFORMANCE OF SERVICES OR SUPPLYING OF GOODS TO A CONSTRUCTION PROJECT BY TIMELY FILING ITS CLAIM OF LIEN WITH THE REGISTER OF DEEDS; AND THE LIEN IS ACCEPTED FOR FILING AND RECORDING BY THE REGISTER OF DEEDS, BUT THE REGISTER OF DEEDS FAILS TO RECORD THE CLAIM OF LIEN WITHIN THE 90-DAY PERIOD, SHOULD THE LIEN BE EXTINGUISHED BECAUSE OF THE FAILURE OF THE REGISTER OF DEEDS TO PERFORM THE MINISTERIAL TASK OF RECORDATION IN A TIMELY MANNER?

## JURISDICTIONAL SUMMARY AND STANDARD OF REVIEW

The jurisdictional summary and standard of review stated in the appellant's brief are complete and correct.

## COUNTER-STATEMENT OF FACTS

The parties stipulated to the facts in the Trial Court. The appellant moved for summary disposition against the appellees based upon a strict reading of MCLA 570.1111(1) [Section 111(1) of the Construction Lien Act – the “Act”] that requires a construction lien claimant to record a claim of lien within 90 days of last performing work or supplying materials for a construction project. In denying the appellant's motion for summary disposition based on the stipulated facts, the Trial Court ruled that the Appellees had substantially complied with the 90-day requirement of the Act. Judgment was then entered for the appellees.

Subsequently, appellant moved for relief from the judgment on the premise that the Michigan Supreme Court had recently ruled in ***Northern Concrete Pipe, Inc. v Sinacola Company-Midwest, inc., 461 Mich 316 (1999)*** that the statutory scheme of section 111(1) of Act did not allow for substantial compliance with respect to the requirement of recordation of the claim of lien within the 90-day period. The trial court then denied the appellant's motion, clarifying its earlier ruling by stating that the appellees' claims of lien were timely filed when the register of deeds accepted them for recording, and that use of the term “substantial compliance” by the court in its earlier opinion was not the reason for denying the appellant's motion for summary disposition.

The Appellees all performed work for Primeau Homes on several residences under construction, and were not paid. They filed their claims of lien prior to 90 days after providing goods and services for the construction of the residences. The Wayne County Register of Deeds accepted the claims of lien for recording prior to the expiration of the said 90-day period. The Wayne County Register of Deeds then delayed in recording the claims of lien for many

weeks after the 90-day periods expired. Suit was instituted for foreclosure and the appellant was included as a defendant under Part 2 of the Act (MCLA 570.1201, ET SEQ. that applies to residences.

Under Part 2 of the Act the appellant State of Michigan Department of Commerce Homeowner Construction Lien Recovery Fund (the "Fund") stands in the place of homeowners who have paid the contractor for an improvement and against whose properties construction liens may not then attach. Licensed contractors and eligible suppliers who might otherwise claim a construction lien must look to the Fund for payment. Money comes to the Fund from the members of the construction industry who are licensed contractors and are required to join, or who join voluntarily to avail themselves of the remedies under the Act, and are entitled to the benefits derived from the Fund. When a contractor has not been paid on a residential project, assuming he meets the eligibility requirements, the Fund is there to pay him up to \$75,000.00. As will be discussed in the Argument below, the Fund should, in this instance, be required to pay the Appellees.

### **ARGUMENT**

The appellant Fund states that the findings of the Court of Appeals are in error because they are in direct opposition to the decision of this Court in ***Northern Concrete Pipe***, *supra*. However, the facts in ***Northern Concrete Pipe*** are significantly different than those of the present case.

In ***Northern Concrete Pipe***, the lien claimant had filed its claim of lien by mail, with an insufficient description of the subject real estate. The claim of lien was returned to the claimant for correction, and the lien claimant submitted it again. The county register of deeds again returned the claim of lien for correction, and it was again corrected and submitted, at which time it was accepted for recording and subsequently recorded by the register of deeds. While the corrections were being requested and made, but before recordation, the 90-day period elapsed.

Because of the errors in the legal description of the property, the register of deeds had never accepted the claim of lien for recording during the 90-day period, and the claim of lien could not even have been deemed to have been "filed."

In the present case, the claims of lien were filed with the Register of Deeds in Wayne County, and the Register of Deeds accepted the filings, all before the expiration of the 90-day periods in question. However, the Register of Deeds then dropped the ball, and didn't record the documents for many weeks.

The significance of the sequence of events as between the present case and the ***Northern Concrete Pipe*** case cannot be minimized. The present lien claimants could do nothing more than they had done during the 90-day period. The ***Northern Concrete Pipe*** claimant still had to do some work before his claim of lien could be filed, accepted and recorded, all of which happened after the 90-day period had expired.

This Court often uses the word "filing" rather than "recording" when speaking of the 90-day limit in ***Northern Concrete Pipe***. There are three (3) possible interpretations of the use of this language. First, it could be stated that the Court intended no differentiation between "filing" and "recording." If this was intended, then Appellees contentions are right. Second, the Court might be deemed to have intended that it was the acts of filing and acceptance for filing that had to be completed within 90 days. Third, the use of the word "filing" rather than "recording" simply shows the ambiguity of the language of the statute, when applied to and used in actual practice. This confusion of the words "filing" and "recording" justifies an interpretation of the statutory language in light of the present facts and circumstances, as opposed to those facts existing in ***Northern Concrete Pipe***.

The Fund flatly states that ***Northern Concrete Pipe*** requires recording within 90 days. The strictest construction applies in every instance. Failure to record within 90 days means that the claims of lien are extinguished.

If the court follows the logic ascribed to it by the appellant, then the validity of all claims of lien is now in the hands of the various county registers of deeds, and their ability to timely record properly submitted claims of lien.

The claimant cannot perform the ministerial task of recordation for the register of deeds. All the claimant can do upon submitting the claim of lien to the register of deeds is take his copy with the date and time of acceptance of filing stamped on it, and be on his way. It is then entirely within the control of the register of deeds to record the claim of lien. If the register of deeds fails to perform the ministerial task of stamping the claim of lien with the date and time of recordation and the liber and page of the county records where the claim of lien has been filed within the statutorily mandated 90 days, then the inaction on the part of the register of deeds extinguishes the lien, according to the appellant's position.

Is the claimant to be penalized for having done everything it was supposed to do prior to the expiration of the 90-day period because the register of deeds failed to take appropriate action? Are the interests of settling titles precisely on a 90-day statute of limitations more important than the stated purposes of the statute?

As stated in **MCLA §570.1302(1)**:

This Act is declared to be a remedial statute, and shall be liberally construed to secure the beneficial results, intents and purposes of this Act. Substantial compliance with the provisions of this Act shall be sufficient for the validity of the construction liens provided for in this Act, and to give jurisdiction to the court to enforce them.

If the appellee did all it could do to obtain recording, and through no fault on its part the recording did not occur, then the appellee complied with the Act. This was expressed by the trial court in its ruling on appellant's motion for relief from judgment.

Even if that were not the case, there is a strong argument here for application of the statutory "substantial compliance" provision. This Court, at page 321 of its decision in **Northern Concrete Pipe**, *supra*, stated that applying the substantial compliance provision to the 90-day



statute requires that an analysis of relevant factors on a case-by-case basis be made. In

***Northern Concrete Pipe***, the Court stated that, those factors included:

The overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of the statutory provision is replaced by the uncertainty of a substantial "compliance clause"; the interest of future litigants and the public; the extent to which a court can reasonably determine what constitutes "substantial compliance" within a particular context; and, of course, the specific language of the "substantial compliance" and other provisions of the statute.

***Northern Concrete Pipe***, *supra*, pp. 321-322.

Those criteria for applying the substantial compliance provision of the Act to the facts in this case are met. First, the purpose of the statute is remedial. The "remedy" in question is the ability of an unpaid contractor providing improvements to real estate to be able to claim a lien on the property. That is the remedy that the Appellees are trying to enforce.

Arguments regarding potential for prejudice or unfairness where the "substantial compliance" clause is applied to protect the interests of protected parties should be determined in favor of the lien claimants. They are the primary beneficiaries of the remedies and protection provided by the statute. Owners of residential property are protected by the Fund, and the money in the Fund comes from the potential claimants. Because the Fund was established to pay the claims of the lien claimants, the dangers alleged to exist with respect to the subsequent purchasers of the property covered by the liens are substantially ameliorated. If the Fund is there to pay lien claimants, then subsequent purchasers know that they will not be obligated for the lien claims. The protection of the subsequent purchaser is secondary to the protection granted to the unpaid subcontractor or materialman.

The extent to which a court can reasonably determine what constitutes "substantial compliance" within this particular context is easily ascertained because the documents in question, the claims of lien, are stamped with the dates upon which they were received and accepted for recording. Those dates were all within the 90-day periods. This is where the

**Northern Concrete Pipe** case diverges from the present case. In this case, there is a definite criterion upon which to measure whether “substantial compliance” was made by all appellees.

Extending the time for filing beyond 90 days, as occurred in **Northern Concrete Pipe**, is not being argued. The fact situation at issue is one in which the filings were made in a timely fashion, and the ministerial recording duties of the Register of Deeds were not fulfilled in a timely way.

### **CONCLUSION**

The appellees did everything they could reasonably do to comply with Section 111(1) of the Act. This case should be decided in favor of the appellees based upon that fact alone. Short of that, “substantial compliance” applies to the meaning of the 90-day limitation to the extent that lien claimants who have fulfilled their responsibilities to protect their liens by the filing of their Claims of Lien within 90 days of last providing service or goods would comport with the legislative intent of the “substantial compliance” provision to “secure the beneficial results, intents and purposes of this Act.” **MCLA §570.1302(1)**.

Rather than creating uncertainty, a ruling in this fashion will create more certainty with respect to the requirements of the Construction Lien Act, without seriously impinging on any other substantial public interest or the certainty of land titles. It would take the workings of the Act out of the hands of the registers of deeds.

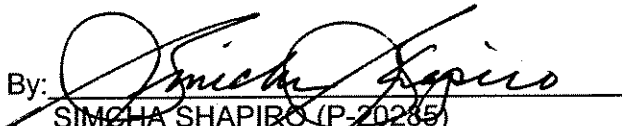
It is simply a just result that lien claimants who have done everything they can to assert their remedy be entitled to the benefits of that remedy, regardless of the inability of a public agency to perform its ministerial duties.

The Court of Appeals was not in error in any sense when it differentiated the present case from this Court’s opinion in **Northern Concrete Pipe**.

**RELIEF SOUGHT**

Third-Party Plaintiff/Appellee CAPPY HEATING & AIR CONDITIONING, INC. requests that appellant's appeal be denied, and that this Court affirm the decision of the Court of Appeals.

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